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Standards of Care in Dentistry

Jerome A. Streem

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THIS ARTICLE WILL DISCUSS briefly each of the three sources of liability for which a dentist might commonly be subject to a malpractice suit: negligence, assault and battery, and breach of contract.

Negligence

According to law, the dentist is a man of superior knowledge so far as dentistry is concerned. He is subject to a suit for negligence if he does not use this knowledge, and should there thus be a poor result to his treatment, such as in orthodontic correction, treatments of the tissues surrounding the teeth, or in the construction of a denture, full or partial.

However, a patient's dissatisfaction with his dental work is not sufficient per se to spell out a malpractice case against the dentist. The patient must be able to prove, first, that the dentist failed to perform his duty adequately; and second, that this resulted in injury. Both of these conditions must occur before a suit can be expected to be determined in a patient's favor.[1]

It is a matter of law that a dentist is performing his duty adequately when he possesses and exercises the reasonable and ordinary degree of learning, skill, and care of a reputable dentist practicing in the same or similar community.

Proof that he has used his superior knowledge would thus be the dentist's best defense against a suit for negligence. For example, suppose a patient wishes to have a partial denture constructed for himself, though his dentist has advised against it and recommended a full denture. Should this partial denture then prove unsatisfactory, and the patient wish to sue, the dentist must prove that he exercised his superior knowledge and did suggest to the patient that he have all his teeth extracted and a full denture constructed. A statement to this effect, signed by the patient, would then be the best method of relieving the dentist of any responsibility.

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* Of Santa Monica, Calif.; Columnist for the Cleveland Plain Dealer and The Register and Tribune Syndicate; member, Cleveland Dental Society; etc.

1 Ashjian, Leon J., D.D.S.; D.D.S. Los Angeles County Dental Society (May 1959).

Should the dentist cut his patient severely while preparing a tooth for a restoration; burn a patient during cautery; use a defective hypodermic needle causing an infection; fracture a jaw while extracting a tooth; or use drugs improperly so that the patient suffers an adverse reaction, he is open to a suit for negligence in committing acts which have not displayed superior knowledge.

He is also guilty of an act of negligence if he omits a service which might have prevented injury to a patient. Failure to take an x-ray when indicated; failure to perform adequate post-operative treatment or even observation; inadequate sterilization; or lack of investigation of systemic diseases which can affect dental conditions, are all examples of acts which, when not performed by the dentist, could contribute to an injury to a patient.

In most cases, testimony of expert witnesses is necessary in order to show that there was negligence on the part of the dentist, and that this negligence resulted in harm to the patient.

A patient suffered a fractured jaw as a result of the removal of a tooth. She claimed that the fracture was due to negligence on the part of the dentist while the dental surgery was being performed. However, the court ruled:

> "There is no evidence in the record of any unskillfulness or negligence on the part of the dentist in removing plaintiff's impacted tooth. He testified that he used the proper and approved method or technique in removing the tooth, and in this respect he is supported by the testimony of the other dentists introduced as witnesses and who were qualified to testify on that point. Plaintiff wholly failed to make out a case of negligence, unless the jury should be permitted to infer negligence from the result. . . . In order to recover damages from a physician or dentist for want of proper care or skill plaintiff has the burden of showing that the defendant was unskillful or negligent and that the injury complained of was produced by such want of skill or care. In malpractice suits against dentists such proof can only be established by the testimony of experts skilled in the dental profession. They are the only witnesses who are qualified to testify as to whether there was negligence in the method of treatment." [2]

However, there are two types of cases in which malpractice can be established without the testimony of experts; these are

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[2] Donoho v. Rawleigh, 230 Ky. 11, 18 S. W. 2d 311 (1929).

cases of *res ipsa loquitur* (the thing speaks for itself), and *admissions against interest.*[3]

There is no uniform test to determine when res ipsa loquitur will be applied by the court, but it is generally agreed that this doctrine has two conditions:

1. The injury must be of a kind which ordinarily does not occur unless the dentist is guilty of negligence.

2. It must have been caused by an agency or instrumentality within the exclusive control of the dentist.

Expert witnesses will not be required when the patient himself can give satisfactory evidence. One court gave this opinion relative to res ipsa:

> "Ordinarily, proof of the prevailing standard of skill and learning in the locality, and proof on the question of the propriety of particular conduct by the practitioner in particular instances, is not a matter of general knowledge, and can only be supplied by expert testimony. . . . Only in those instances where the question of the propriety of the treatment may be said to be common knowledge, or the matter is of such a nature as may be ascertained by the ordinary use of the senses of a nonexpert, does expert testimony become unnecessary." [4]

The court stated that it was not necessary to have expert testimony when a patient claimed that the use of an unsterile needle had caused injury:

> "Where the results of negligence on the part of a physician or dentist are peculiarly within the knowledge of experts, the testimony of those experts is a necessary element of a plaintiff's case. The danger of infection from an unsterile instrument, or a dirty field of operation, is a matter of such common knowledge that a jury is authorized to draw the reasonable inference that an infection was caused by negligence where an unsterile instrument is used, or the operative field is not properly sterilized." [5]

Admission against interest is a term that is self-explanatory. It is an admission by the dentist (or his assistant) of guilt for the act. The simple statement by the dentist, "I'm sorry, that was my fault," or, "The disc slipped when my attention was

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[3] Jordan, Frank W., LL.B., D.D.S.: Kentucky State Dental Journal (Oct. 1956).

[4] Rising v. Veatch, 117 Cal. App. 404, 3 P. 2d 1023 (1931).

[5] Mastro v. Kennedy, 57 Cal. App. 2d 499, 134 P. 2d 865 (1943).

distracted by the telephone," could be sufficient evidence to determine the suit in the patient's favor.

Once there has been a negligent act performed, a dentist further leaves himself open to suit if he fraudulently misleads the patient as to his injury, whether it be as to the extent or the cause of that injury. Many states have declared that the statute of limitations does not begin to run until the patient learns of the harmful act. Thus, should a needle break and be left imbedded in a patient's jaw, the statute of limitations would not start until the patient learned of the broken needle.

Though they will limit the period following injury during which a patient may sue the dentist, the various states have adopted several rules governing this statute.

Some states have ruled that the statute begins to run when the negligent act is performed; others, not until the injury becomes apparent to the patient. The time when the doctor-patient relationship terminates is the governing factor used in some courts.

Most of the injuries which might commonly result in a malpractice suit have been mentioned in the case examples above. Some are excusable accidents, but some are inexcusable. Many of the cases should be decided according to the testimony of expert witnesses. But many are always inexcusable whenever they occur, and the mere fact that they happen is evidence that liability may be charged. These are the accidents in which the doctrine of res ipsa loquitur can be invoked.

The patient's jaw can be fractured during an extraction because the bone is locked around the tooth and in order to remove the tooth either the bone or the root must give. In most cases the root of the tooth will break, but there are some cases in which the bone may break. The best evidence here as to whether the jaw fracture was excusable or not can be x-rays taken before the extraction and, in some cases, even the tooth with the involved bone after the extraction. Good evidence is most often given by experts.

If the root breaks during the extraction the decision whether to remove the root or to allow it to remain in the jaw would best lie with the dentist performing the surgery. However, if the root is left in the jaw he should inform the patient of this fact.

In removing the root of one of the upper back teeth there will be danger of pushing it into the maxillary sinus. Precau-

tions must be taken not to shove a root tip of a lower back tooth into the mandibular canal, which carries the blood vessels and the nerves of the lower jaw forward. In either case an x-ray would again prove good evidence and the testimony of experts should be given to show whether or not the accident was excusable.

If an injury results from a denture, it would probably require expert testimony to show whether or not the denture caused the injury and whether or not this injury could have been prevented.

Should a patient be cut by the dental drill while a cavity is being prepared, res ipsa loquitur could be used, but the dentist would then have to prove, in order not to be found guilty of negligence, that the slip of the drill was unavoidable, probably due to the movement of the patient.

Assault and Battery

Should a dentist extract more teeth or different ones than those of which the patient has been informed, he commits technical assault and he is liable. Even if he is in the process of removing a tooth under a general anesthetic and then finds another which should be removed, technically he must wake the patient and obtain his permission in order to perform the additional surgery. However, since in many cases this would be extremely impractical, when a patient understands the nature of his condition, the dentist is allowed a measure of discretion in his treatment. He may often proceed in cases of emergency, and the scope of what constitutes an "emergency" can be a broad one, sometimes involving "implied consent."

The impracticality of waking a patient, explaining to him the change of procedure for the operation, and placing him under the anesthetic again, has been accepted only to a limited extent. For this reason hospitals and surgeons make extensive use of written waivers.

Generally, the consent of the father is necessary before any type of operation may be performed on his minor child. However, most cases do not require consent to be explicitly stated, either by the patient, or in the case of a minor, by his father. Once the dentist has given his diagnosis and suggested treatment, if he is allowed to proceed, then there can be a legal pre-

sumption that the patient has consented to this treatment.[6] Similarly, when treatment is given in an emergency, no explicit contract is required. This is implied consent.

Breach of Contract

When breach of his contractual duties by a dentist has resulted in injury to a patient, suit brought by that patient usually will also charge negligence. But basically, the dentist's obligation has arisen from the contract. If for any reason the dental work fails to live up to promises made by the practitioner (i.e., the contract) the patient can charge negligence, and then show that the work was carelessly performed. But even when there has been no negligence, if the dentist has made certain promises regarding the work and fails to perform them, suit can be brought charging breach of contract.

An example of this might be a case where a patient agreed to pay a certain specified fee for the construction of jacket crowns which were to match his other teeth in respect to color. Failure of the dentist to deliver jackets of the promised shade has been found by the courts to constitute a breach of contract. But unless the dentist took upon himself an additional burden by stating that the patient himself must be satisfied, experts must present testimony in order to decide the case. However, the patient does always have a duty to return to the dentist a reasonable number of times in order to allow him to deliver the satisfactory appliance.

Though there be a promise by the dentist, either implied or expressed, as to the quality and quantity of his work, there also will be a promise by the patient to pay a fee. A doctor is entitled to a reasonable fee for his services, but the question as to what is reasonable cannot arise when a specific agreement has been reached. Once a patient has expressly agreed to pay a certain specified fee for his work, it is immaterial what other dentists might charge for the same work, or what the same dentist might charge other patients for similar work.

For the most part, a patient pays a dentist not for his materials but for his services. For example, an x-ray film is an aid to the dentist in diagnosis and in his treatment. The patient is paying for the service of the dentist in its interpretation. He does not have the right to demand that the film be turned over

[6] Carnahan, Charles W. (Lecturer of Dental Jurisprudence, School of Dentistry, Washington University), The Dentist and the Law, 1955.

to him because, "I paid for it." One court expressed this rule in these words:

> "In the absence of agreement to the contrary such negatives are the property of such physician or surgeon who has made them incident to treating of a patient. It is a matter of common knowledge that x-ray negatives are particularly meaningless to the ordinary laymen. But their retention by the physician or surgeon constitutes an important part of his clinical record in the particular case, and in the aggregate these negatives may embody and preserve much of value incident to a physician's or surgeon's experience. They are as much a part of the history of the case as any other case record made by a physician or surgeon. Also in the event of a malpractice suit against a physician or surgeon, the x-ray negatives which he has caused to be taken and preserved incident to treating the patient might often constitute the unimpeachable evidence which would fully justify the treatment of which the patient was complaining. In the absence of an agreement to the contrary there is every good reason for holding that x-rays are the property of the physician or surgeon rather than the patient or party who employed such physician or surgeon, notwithstanding the cost of taking the x-rays was charged to the patient or to the one who engaged the physician or surgeon as part of the professional service rendered." [7]

Liability for Acts of Others

If the dentist refers the patient to another dentist, a specialist, to do the work as he (the second dentist) sees fit, then the second man is an independent contractor.

However, should injury to a patient result from the work of an independent contractor, before liability can be fixed it is necessary to determine the exact cause of the injury.

If, for example, a dentist sends a patient to an oral surgeon for extractions and marks a chart incorrectly, or sends along the chart of another patient, the referring dentist is *always* liable if the wrong teeth are removed. But, the oral surgeon is also responsible if the facts of the case indicate that he should not have followed the charts blindly, but should also have made his own examination.

However, if the first dentist hired another dentist to assist with the work, this is a master and servant relationship, and the hiring dentist can always be held responsible for the acts of the assistant.

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[7] McGarry v. J. A. Mercier Co., 272 Mich. 501, 262 N. W. 296 (1935).

Conclusion

Dr. Frank W. Jordan[8] has stated that there are three precautions which should be taken by every dentist in order to control dental malpractice hazards: *Good Faith, Good Records,* and *Common Sense.*

Dentists can be of immeasurable assistance to attorneys and to themselves if they will obey these cautions. Malpractice suits can thus be prevented; or if they do occur, can be determined easily.

Good Faith, in himself and in the accepted and proven practices of the dental profession, will help the dentist to perform his work to the best of his ability and thus to use his superior knowledge. *Good Records* should include thorough x-ray examination and a good personal history of the patient. These will not only prove helpful in the performance of good dentistry, but should a patient bring suit against the dentist, they can be reliable evidence. *Common Sense* will aid the dentist in performing his dentistry in the best way possible, and in using his knowledge for the benefit of himself and his patient.

When a dentist follows these three precautions, he is performing his dentistry to the best of his ability, and any injury resulting to a patient will not be due to his negligence.

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[8] See note 3, above.